UNC SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 7 | Issue 1 Article 7

9-1-2008

Garcetti's Impact on the First Amendment Speech Rights of Federal Employees

Paul M. Secunda

GARCETTI'S IMPACT ON THE FIRST AMENDMENT SPEECH RIGHTS OF FEDERAL EMPLOYEES

PAUL M. SECUNDA*

INTRODUCTION

Garcetti v. Ceballos[1] does nothing less than redefine the whole conception of what role public employees should play in ensuring the fair and efficient administration of government services. Through its holding, the Court has now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers. Yet, if possible, the situation is even worse for federal employees.[2]

Garcetti is the watershed public employment free speech case that drastically cuts down on public employees' First Amendment expression rights while such employees are working pursuant to their official

---

* Associate Professor of Law, Marquette University Law School. This paper was presented at the 2008 *First Amendment Law Review* Symposium, *Public Citizens, Public Servants—Free Speech in the Post-*Garcetti *Workplace* at the University of North Carolina School of Law. I am indebted for the feedback and comments I received from numerous individuals at that event. I would also like to thank specifically Rick Bales, Jeff Hirsch, Nancy Levit, and Helen Norton, for valuable comments on earlier drafts of this article.

1. 547 U.S. 410 (2006).

2. This is an important issue because there are approximately two million federal workers in the United States, William F. West & Robert F. Durant, *Merit, Management, and Neutral Competence: Lessons from the U.S. Merit Systems Protection Board, FY 1988-FY 1997*, 60 PUB. ADMIN. REV. 111, 112 (2000), and the numbers continue to rise. Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2008/04/public-employme.html (April 30, 2008) ("[T]he federal government increased its workforce by 13,800 in the first three months of 2008.").

duties.[3] In the name of managerial prerogative,[4] federalism, and separation of powers,[5] *Garcetti* has the effect of making government less transparent, accountable, and responsive. This is because public employees are less secure in their ability to speak out against governmental fraud, corruption, abuse, and waste without facing retribution from their public employers.

The reason for *Garcetti's* magnified effect on federal employees relates to three primary factors, which include: (1) the unique administrative framework established for federal employees to vindicate their First Amendment interests under the Civil Service Reform Act of 1978 (CSRA);[6] (2) the inexpert nature of the Merit Systems Protection Board (MSPB), the federal agency that has been delegated the power to hear federal employees' First Amendment claims; and finally, (3) the apparent inability of the Federal Circuit Court of Appeals, the court delegated the authority to hear appeals from the MSPB, to understand the nuances and subtleties of the *Garcetti* decision. The cumulative impact of these factors is that federal employees, post-*Garcetti*, will have to vindicate their rights to free speech in the workplace primarily through a hodgepodge of civil service laws, grievances filed under collective bargaining agreements, and ineffective federal whistleblower statutes. When all of these fail, as they inevitably will, federal employees will have to just tolerate the evisceration of their constitutional rights and stay

---

3. In determining what the employee's official duties are, "[t]he . . . inquiry is a practical one" and should focus on "the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

4. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. (forthcoming 2008) ("The Court's opinion [in *Garcetti*] contains a sketch—concededly partial and somewhat obscure—of managerial control over employee speech as essential if management is to be held politically accountable for the performance of public institutions.").

5. *See* Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2573 (2007) (Kennedy, J., concurring) ("The Court has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" (quoting *Garcetti*, 547 U.S. at 423 (2006))).

6. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

silent at work. Collectively as citizens, we are all the poorer for tolerating this undemocratic state of affairs.[7]

This contribution to the Symposium proceeds in three parts. First, it considers the problems presented by the *Garcetti* decision in all public employment contexts and reviews in detail three recent court decisions to document this impact. Second, it discusses briefly the peculiar system established currently for federal employees to vindicate their constitutional rights under the Civil Service Reform Act of 1978. Finally, the third part illustrates how the lack of familiarity with, and cavalier attitude towards, these types of claims by both the MSPB and the Federal Circuit have magnified *Garcetti*'s malignant impact for federal employees.

THE GARCETTI PROBLEM GENERALLY

Before discussing the specific problem posed by the *Garcetti* holding in the federal employment context, it is necessary to consider the impact of the holding on all public employment free speech cases. To accomplish that, the pre-*Garcetti* framework must also be considered. In short, *Garcetti's* impact has been significant and from the standpoint of the constitutional rights of public employees, catastrophic.[8] This adverse

---

7. In a recent paper, I offered a solution to this quandary based on my belief that federal employees are not able to receive a meaningful remedy for their First Amendment claims under the Civil Service Reform Act of 1978. Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. (forthcoming 2008) (arguing that a *Bivens* implied constitutional right of action should be available for federal employee First Amendment claims against their agencies and supervisors). Of course, overturning or modifying *Garcetti* would also have a salubrious effect on federal employee free speech rights.

8. For one prominent example, consider Dean Erwin Chemerinsky's take on *Garcetti*: "*Garcetti v. Ceballos* means that there is no First Amendment protection for such officers or other government employees who expose wrong-doing on the job, even when it is truthful and of great public concern." Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2D 335, 340-41 (2006); *see also* Charles W. Rhodes IV, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1193-94 (2007) ("Rather than the relatively stable balancing process that had become familiar in these cases, the lower courts are now confronted with an inexact classification prerequisite that is already generating unpredictable results.").

impact will be documented through three case studies in the third subsection of this Part.

A. Pre-Garcetti Framework for Public Employee Speech

Prior to *Garcetti*, public employees' rights to free speech were hampered by a bewildering array of case law that sought to lay out a coherent framework for such claims. As Professor Kermit Roosevelt has aptly observed, the difficulty in public employment law stems from the fact that:

> the participants are occupying multiple roles, and the different roles possess very different rights and powers. The government as sovereign generally may not punish citizens for the content of their speech, but the government as employer may demand that employees do the job they were hired to do, and insofar as effective performance of that job requires saying some things and not others, it can control their speech. Correlatively, individuals as citizens retain their rights to free speech, but as employees they are subject to job-related sanctions such as dismissal if their speech compromises their performance.[9]

To focus on the rights in this context of "individual as employees" and "government as employer," the Court, in a number of decisions from 1967 to 1983, set up a framework that primarily examines: (1) whether the speech is on a matter of public concern,[10] (2)

---

9. Posting of Kermit Roosevelt to Balkinization, http://balkin.blogspot.com/2006/05/whos-afraid-of-ceballos.html (May 31, 2006, 5:15 PM).

10. Connick v. Myers, 461 U.S. 138, 147-48 (1983). This type of speech "typically [includes] matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam). Sometimes the question is asked whether the speech addresses a "matter of political, social, or other concern to the community," *Connick*, 461 U.S. at 146, or whether it is "a subject of legitimate news interest." *City of San Diego*, 543 U.S. at 83-84. In many cases, the fact that a court decides that public employee speech is not on a

a weighing of the relevant employee and employer interests,[11] and (3) the question of causation.[12] Additionally, issues of qualified immunity under Section 1983 have to be resolved to determine individual, official liability.[13] Needless to say, and the complete framework need not be rehearsed here,[14] even before *Garcetti* there was plenty of confusion and plaintiffs had to negotiate many hurdles in this area of the law.

B. The Dawning of the Age of Garcetti

The initial hope for public employee advocates was that the Court in *Garcetti* would better define the meaning of public concern and make it somewhat easier for plaintiffs to prevail on their workplace speech claims, especially where government misconduct or employee safety and health were involved. In fact, had it not been for the untimely retirement of Justice O'Connor in the summer of 2005,[15] there is every indication

---

matter of public concern is why employees lose these cases. *See, e.g., City of San Diego,* 543 U.S. at 84.

11. Pickering v. Bd. of Educ., 391 U.S. 563 (1968). Under this balancing test, first developed in the public school teacher context, a court weighs the First Amendment interests of the employee as a citizen against the government interest in running an efficient government service for the public. *Id.* at 568. If the balance under *Pickering* favors the government, the public employee has no First Amendment rights in the speech.

12. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 286-87 (1977). If the public employer is successful in meeting its burden that it would have made the same decision absent the protected conduct, there is again no liability. *Id.* at 285-86. This is because "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.*

13. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). Qualified immunity from individual damages is applicable if a reasonable person would not have known that his or her conduct violated clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

14. *See* Secunda, *supra* note 7 at 2, for a complete explanation of what I have previously called "the free speech five-step."

15. Justice O'Connor gave notice of her resignation on July 1, 2005, and was officially replaced by Justice Samuel Alito on his confirmation by the Senate on January 31, 2006. J. O'Connor Retirement Announcement, http://www.supremecour

that such a decision was forthcoming.[16] With O'Connor on the Court, Justice Souter's dissenting opinion would have possibly become the majority decision and would have likely held:

> that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[17]

Such a holding would have largely kept the *Connick/Pickering* framework in place,[18] with the added advantage that the balancing of

---

tus.gov/publicinfo/press/oconnor070105.pdf; J. Alito Press Release, http://www.supremecourtus.gov/publicinfo/press/pr_01-31-06.html. Consequently, *Garcetti* was actually orally argued twice: once in the Fall of 2005 with Justice O'Connor on the Court and then again in the Spring of 2006 with Justice Alito on the Court. FIRST AMENDMENT LAW CENTER, *First Amendment Library Case: Garcetti v. Ceballos*, http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Garcetti_v_Ceballos. The conventional wisdom was that *Garcetti* was initially evenly-split 4-4 and that is why it had to be reargued. *Id.* Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2006/02/public_employee.html (Feb. 18, 2006) ("Appearing to point to a 4-4 split in its membership with the retirement of Justice O'Connor, the United States Supreme Court has decided to rehear the public employee speech case of *Garcetti v. Ceballos* with Justice Alito now as its ninth member. The *Ceballos* case had been originally argued in mid-October 2005.").

16. *See* Posting of Marty Lederman to SCOTUSBlog, http://www.scotusblog.com/wp/ceballos-v-garcetti-what-difference-will-alito-make/ (Feb. 19, 2006, 3:01 PM) ("The employee will lose, and there may even be a holding that a government employee's speech in her "official capacity" is entitled to *no* constitutional protection. Either or both of those results might have occurred even with Justice O'Connor's vote—although I doubt it, as Justice Souter was probably assigned to write the majority opinion.").

17. Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Souter, J., dissenting).

18. *See* Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 99 (2006), for an explanation of the *Connick/Pickering* framework pre-*Garcetti*.

interests would presumably have shifted toward employees in cases involving official wrongdoing or threats to health and safety.[19]

Instead, with Justice O'Connor's retirement and her replacement by Justice Alito, Justice Kennedy's opinion became the majority opinion. Rather than Justice Souter's nuanced balancing of the relevant interests, Justice Kennedy set up a bright-line rule, with a distinctly pro-employer flavor, and determined that public employees are not speaking as citizens when they make statements pursuant to their official duties.[20] As a result, this rule means, at the very least, "that when part of an employee's job is the production of certain speech, he or she can be dismissed if that speech is deemed unsatisfactory."[21]

Consistent with Justice Stevens' dissent in *Garcetti*, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both.[22] To quote Justice Stevens at some length: "[P]ublic employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[23]

Perhaps even more detrimental in the long-term, as established in the case illustrations in the next section, *Garcetti* sets up faulty incentives

---

19. This approach appears to be close to the incremental one championed by Professor George Rutherglen: "When [employer legitimate interests] are present, the employee's protection necessarily is more limited, as it is under whistleblower statutes that protect only complaints about specific forms of workplace misconduct. . . . Progress . . . must be made incrementally, by identifying those areas in which the public employees' [sic] right to speak and the public's right to know can be protected at an acceptable cost." *See* George Rutherglen, *Public Employees, Free Expression and the First Amendment* (Univ. of VA. Pub. Law & Legal Theory Working Paper Series, Paper No. 85, 2008), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art85.

20. *Garcetti*, 547 U.S. at 421.

21. Roosevelt, *supra* note 9, at 3.

22. *See* 7th Cir.: Illustrating the Madness Which is Garcetti, http://lawprofessors.typepad.com/laborprof_blog/2007/07/7th-cir-illustr.html (July 18, 2007), discussing the formalism of the *Garcetti* framework.

23. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

that force public employees to complain outside of work so they can get the protection of being a "citizen."[24]

C. *Garcetti's Impact: Case Studies*

Garcetti's impact can best be explored by examining in some depth representative appellate and district court decisions in the last two years that have relied on the *Garcetti* holding.[25]

1. Davis v. McKinney

In *Davis v. McKinney*,[26] Cynthia Davis filed a lawsuit against a number of individual defendants and different entities of the University of Texas ("UT") System. Davis had been the IS Audit Manager at the UT Health Science Center in Houston, Texas ("UTHSC-H"). Davis' job duties included overseeing computer-related audits and creating audit summaries and reports."[27]

After applying for a promotion, Davis was involved in an audit investigation of physicians' computers and identified eleven computers that were believed to have intentionally accessed pornography, including some she believed that had accessed child pornography.[28] Davis asked her direct supervisor to be taken off the investigation because she felt "the requirement that she review repugnant pornography demeaned her

---

24. These cases are representative, but are contrary to what Justice Kennedy in *Garcetti* had hoped would happen: "A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." *Id.* at 424.

25. One recent study conducted by the Committee on State and Local Government Collective Bargaining and Employment Law of the Section of Labor and Employment Law of the American Bar Association found that public employees in 2007 lost twenty-one out of twenty-five (or 84%) of these *Garcetti* cases on the appellate level. *See* Steven Rynecki et al., *Subcommittee Report: Federal Appellate Decisions on Constitutional Issues—First Amendment*, 2008 MID-YEAR MEETING, Feb. 1, 2008.

26. 518 F.3d 304 (5th Cir. 2008).

27. *Id.* at 307.

28. *Id.* at 307-8.

as a woman."[29] Because Davis felt she was also being harassed by those employees and supervisors who did not want her to continue with her investigation, she wrote an internal complaint letter regarding the "unethical and allegedly illegal" activity directed at her, alleging, "that upper management had a pattern of sweeping pornography investigations under the rug and not terminating or disciplining offending employees."[30] Davis' letter stated that she had contacted the FBI concerning the possible child pornography and the EEOC about discriminatory practices against her. She did not receive the promotion for which she had previously applied and claimed constructive discharge and retaliation after she resigned.[31]

What makes a case like this unique is that without the public employment angle, this would be a fairly run-of-the-mill Title VII[32] discrimination and retaliation case. But because these events transpired in the public workplace, Davis alleged that her employer violated her First Amendment free speech rights by retaliating against her for speaking out on matters of public concern.[33]

Garcetti changes everything at this point. Rather than first asking whether Davis complained about a private personnel matter or a matter of public concern (which was the threshold question under *Connick v. Myers*),[34] *Garcetti* now requires at the threshold a determination of whether the employee was acting pursuant to her professional duties or merely speaking as a citizen.[35] This inquiry is not merely about the job title one has, but what functions one actually carries out.[36]

---

29. *Id.* at 308.

30. *Id.* at 309.

31. *Id.* at 309-310.

32. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000).

33. *Davis*, 518 F.3d at 310.

34. *Id.* at 311.

35. *Id.* at 311-312 ("*Garcetti* changed this analysis in ways not yet fully determined . . . . While all implications of *Garcetti* have not been developed at this point, it is clear that *Garcetti* added a threshold layer to our previous analysis.").

36. *Id.* at 312 ("[*Garcetti*] provides some guidance, indicating that a formal job description is not dispositive . . . , nor is the fact that the speech relates tangentially to the subject matter of one's employment . . . . The case also lists examples of prototypical protected speech by public employees, namely 'mak[ing] a public statement, discuss[ing] politics with a coworker, writ[ing] a letter to newspapers or

There is also much controversy in these cases where the employee is an investigator of some sort and the question is whether she is merely performing her job or going beyond her normal job functions by reporting misconduct by others in the organization. In this regard, the *Davis* court pointed to an emerging principle that,

> [c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job . . . . If however a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.[37]

In other words, it appears that the *Garcetti* question is beginning to turn on whether one is an internal or external whistleblower (which incidentally is how some states define the scope of their own whistleblower statutes).[38] Under this analysis, Davis was considered an external whistleblower for some of her statements and an internal whistleblower for others.[39] She was only allowed to proceed on her external complaints.[40]

---

legislators, or otherwise speak[ing] as a citizen." (citing Spiegla v. Hull, 481 F.3d 961, 967 (7th Cir. 2007)).

37. *Id.* at 313.

38. The court does, however, state that the fact that the complaint is internal is not dispositive. *Id.* at 313 n.3. For different state approaches to whistleblower statutes based on internal versus external whistleblowing, *compare* New Jersey Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-3 (2006) (applying to internal whistleblowing) *with* CAL. LAB. CODE § 1102.5 (2004) (applying only to employees who engage in whistleblowing externally to "a government or law enforcement agency").

39. *Davis*, 518 F.3d at 315 (discussing which statements were written as an employee and which statements were not written as part of Davis' job duties).

40. *Davis*, 518 F.3d at 317-18. But Davis still has a very long road ahead of her if she is ultimately to prevail: on remand, she must still show she was speaking on matters of public concern, Connick v. Myers, 461 U.S. 138, 154 (1983), that her First Amendment interests outweighed her employer's efficiency interests (the

This case represents a classic example where public employees are being given an incentive to air the dirty laundry of their public employers to gain constitutional protection. In fact, Davis might have done well, at least for her constitutional claim, not to complain internally at all. The moral of the *Garcetti* story appears to be to go directly to an external agency, do not pass Go, and certainly do not attempt to resolve internally. Needless to say, this state of affairs leads to a tremendous waste of judicial resources on unnecessary litigation that might have been resolved internally. It is also counter to other areas of employment law (see sexual harassment law cases under Title VII such as *Burlington Industries, Inc. v. Ellerth*[41] and *Faragher v. City of Boca Raton*[42] and ERISA[43] denial of benefit cases such as *Firestone Tire & Rubber Co. v. Bruch*[44]) under which employees are required to first exhaust internal procedures before filing an external complaint.[45] Of course, even if courts interpreting *Garcetti* would not push public employees towards external reporting, they would still need to provide some protection to these employees by not too expansively defining job duties, as the next case illustrates.

Pickering balancing test), Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968), that her employer would not have made the same decision absent this protected conduct (*Mt. Healthy* test), Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 286-87 (1977), and that it was not objectively reasonable for the defendant officials to take the actions they did given what were then clearly established constitutional rights (qualified immunity issue), Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Phew! It is amazing anyone even bothers to bring this type of complaint.

41. 524 U.S. 742, 765 (1998) (requiring employers to exercise reasonable care to prevent and correct harassment and requiring employees to not act unreasonably in preventing and correcting harassment or otherwise avoid harm).

42. 524 U.S. 775, 805 (1998) (same).

43. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000).

44. 489 U.S. 101, 109 (1989) (requiring exhaustion of internal appeals before filing benefits claim in ERISA cases).

45. Scott Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 981 (2007) (establishing that the Supreme Court has adopted the policy of requiring employees to try internal dispute resolution before suing—or lose their claims.).

2. Morales v. Jones

The public employee free speech carnage continues in *Morales v. Jones*.[46] One would think that when a police officer reports to an assistant district attorney that his police chief is harboring a felon, and is then reassigned to street patrol for his trouble, that he would be considered to have engaged in speech on a matter of public concern potentially protected under the First Amendment.[47] Not so under *Garcetti* and the wide scope given to what counts as official capacity speech.

The Seventh Circuit in *Morales* reversed a jury verdict in favor of the police officer and found that this type of speech was pursuant to the police officer's official duties[48] and therefore, not protected by the First Amendment.[49]

The dissenting judge in *Morales* makes the point that the police officer was not required as a part of his job to report the chief's conduct to the assistant district attorney:

> At the time, Lt. Morales was on duty, delivering a report he was obliged to deliver, and assisting the district attorney in Vincent Ray's prosecution. However, as Lt. Morales testified, although he was obliged to deliver the report and assist in Ray's prosecution, he was not obliged to report his suspicions about why the report

---

46. 494 F.3d 590 (7th Cir. 2007).

47. *Id.* at 593-95.

48. *Id.* at 597-98. But again a distinction was made between internal speech and external speech. *Id.* at 597. Although the officer received no protection for his internal complaints, the exact same speech made in response to a subpoena in a civil suit was not pursuant to his official duties. *Id.* at 598. The court therefore remanded the case for a new trial so that a jury could be properly instructed about the "protected" and "unprotected" aspects of the same speech. *Id.*

49. *Id.* at 598 ("Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do. Nonetheless, Morales testified about speech he made pursuant to his official duties and we must determine whether that fact renders his deposition unprotected. We hold that it does not.").

> page was missing. R. 144 at 628, 641, 646. In disclosing his suspicions, he went beyond his work duties.[50]

So it is astonishing that, "[the police officer's] demotion for truthfully reporting allegations of misconduct may be morally repugnant, [but] after *Garcetti* [ ] does not offend the First Amendment."[51] But courts seem to be giving inappropriate, wide latitude to employer assertions as to what makes up the job of their employees. By doing so, and this is clear in *Morales*, courts appear hesitant to go through the record more thoroughly and second-guess employers' contentions when necessary.

The result of court's "taking the employer's word on it," is that public employee free speech protections have been diminished. But even if the conduct had been part of the employee's job as the majority found, why isn't it possible for some speech to be speech as a citizen on a matter of community concern? Especially where your boss is committing a serious crime. The answer is: only because the Court's opinion in *Garcetti* requires a nineteenth-century formalism of this type.

3. O'Dea v. Shea

Finally, a representative district court case illustrates the impact of *Garcetti* on not only trial courts, but how employer attorneys are beginning to react to *Garcetti* and strategically advise their public employer clients. In *O'Dea v. Shea*,[52] the court granted summary judgment to a state employer where the employee claimed that she was given a poor performance review in retaliation for speaking out on a matter of public concern.[53]

It appears that the court could have decided this case more easily based on the fact that the disputed performance review appeared to be a purely private employment dispute between O'Dea and her employer.[54]

---

50. *Id.* at 598.

51. *Id.* at 599.

52. No. 3:04-cv-1214 (D. Conn. Sept. 4, 2007).

53. *Id.* at 6.

54. *Id.* at 1-2 ("In the Spring of 2004, Shea purchased refurbished used furniture for the Detoxification Unit at the hospital. When O'Dea found out about

Instead, the court reached for the conclusion that *Garcetti* controlled the case: "[A]n employee may still be performing his job when he speaks, even if that expression is not demanded of him."[55] This seems to mean that even if the job description does not technically include the speech at issue, the scope of covered speech can be magically expanded to include even that expression "not demanded of him."[56] Here, raising concerns about insect-infested furniture becomes part of her job functions because she decides to talk about it![57] The lesson: don't concern yourself about things at the public workplace that are not in your job description or else they will become part of your job description. This form of circular reasoning could make everything anyone ever discusses at work *Garcetti*-unprotected speech. Needless to say, the court concluded that the employee raised her concerns in her professional capacity and therefore, her speech was not protected by the First Amendment.[58]

One prominent management-side employment law blogger responded to this decision by suggesting:

> For employers that are considering revising an employee's job duties or position description, it makes sense to include a reference to reporting safety or other concerns (if that is a legitimate part of the job). Although the employer may believe that this is implicit in particular jobs, it is helpful to have this established at a neutral point in time in writing—rather than as a company policy.[59]

---

the purchase, she spoke with Shea, in Shea's office, about her concern that use of refurbished furniture in a medical unit 'raises a lot of health care issue [sic].' According to O'Dea, she was concerned that bringing used furniture into the facility would lead to more insect infestations.").

55. *Id.* at 5.

56. *Id.*

57. See *Id.* at 6 (explaining that speech was a part of O'Dea's employment as a social worker).

58. *Id.* at 6.

59. Daniel A. Schwartz, *First Amendment Claim Denied Where Employee's Duties Included Raising Issues About Patient Safety*, CONNECTICUT EMPLOYMENT LAW BLOG, http://www.ctemploymentlawblog.com/2007/10/articles/decisions-and-rulings/first-amendment-claim-denied-where-employees-duties-included-raising-issues-about-patient-safety/ (last visited Oct. 9, 2007, 9:51 AM).

So First Amendment rights of public employees may rise or fall on how an employer drafts a job description and whether an employer expressly places reporting obligations in that description. Even if the employer does not follow this sage advice for this Kafka-esque world, the *O'Dea* decision stands for the proposition that job responsibilities will be considered broadly to deprive borderline, voluntary speech of constitutional protection.

II. FEDERAL EMPLOYEES' CONSTITUTIONAL CLAIMS UNDER THE CSRA OF 1978

Given this unfortunate state of affairs, how can things get even worse for federal employees? The answer stems from the peculiar manner in which federal employees must bring their constitutional claims, including First Amendment free speech claims.

Federal employees do not have a section 1983-type civil rights action against federal officials and their agencies.[60] In the absence of such a statutory vehicle, federal employees have sought in the past to rely on the implied, judicially-created cause of action in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.[61] However, since the 1983 Supreme Court decision of *Bush v. Lucas*,[62] federal employees have not been able to use *Bivens* to bring First Amendment speech claims against their government employers.[63] Instead, federal employees must proceed under a collective bargaining agreement grievance scheme,

60. This is strange because "the Court has argued for parallel treatment of state and federal employees who violate the constitutional rights of others." Secunda, *supra* note 7 (citing Butz v. Economou, 438 U.S. 478, 499 (1978)).

61. 403 U.S. 388, 392 (1971) (holding that citizen has an implied Fourth Amendment constitutional private right of action against federal officials for violating his rights against unreasonable search and seizure).

62. 462 U.S. 367 (1983).

63. I have argued for the "reinvigoration of federal employee's First Amendment free speech rights through overturning the decision in *Bush v. Lucas* and implying a direct *Bivens* remedy." Secunda *supra* note 7, at 2. However, given the recent miserly reading to *Bivens* rights in *Wilkie v. Robbins*, the likelihood of this development in the short-term is highly unlikely. 127 S. Ct. 2588, 2618 (2007).

if they come under one,[64] or civil service regulations promulgated under the Civil Service Reform Act of 1978 (CSRA of 1978).[65] Under this civil service scheme, damages are limited to equitable relief and back pay, employees are not eligible for compensatory or punitive damages, and attorney's fees are awarded on a more discretionary basis than other civil rights statutes.[66]

As far as the efficacy of collective bargaining regimes in protecting the First Amendment speech rights of federal employees is concerned, a couple of critical points need to be made. First, these contractual avenues for relief do not focus on the constitutional issues at stake in the same way that a federal court might. This is because the issue is not whether the Constitution has been violated, but whether the federal agency had "just cause" to take the employment action against the employee.[67] The arbitrator, who is appointed by the parties to interpret the collective bargaining agreement, may look at constitutional

---

64. 5 C.F.R. § 752.405(b) (2008) (covered federal employees may appeal an adverse employment decision under an applicable, internal grievance procedure or to an Administrative Judge (AJ) designated by the MSPB, but not both); *see also* Local 2578, Am. Fed'n of Gov't Employees v. Gen. Servs. Admin., 711 F.2d 261, 264 n.11 (D.C. Cir. 1983). S. Barry Paisner & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and The Statutory Rights Provided to Public Employees*, 37 N.M. L. REV. 357, 372 (2007) ("[S]ection 7121 provides that all collective bargaining agreements entered into pursuant to the provisions of the CSRA must contain a 'negotiated grievance procedure' by which federal employees can pursue any claims that they may have arising under the collective bargaining agreement.").

65. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). This is because the Court concluded in *Bush* that there is an effective alternative remedy under the Civil Service Commission regulations for such claims. Bush v. Lucas, 462 U.S. 367, 388 (1983). The Court also found that there were "special factors counseling hesitation," including Congress' institutional competence in crafting appropriate relief for aggrieved federal employees. *Id.* at 380.

66. 5 U.S.C. §§ 7701(g), 1221(g), 1214(g) (2006); 5 C.F.R. §§ 1201.201-1201.203 (2008).

67. *See* Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right To Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 940 n.4 (2001) ("[P]ublic employee unions typically negotiate rights not to be fired without just cause, which in turn place limits on the authority of government agencies to fire workers who speak out.").

law to get a sense of whether the action was just,[68] but that is not the same thing as having a court consider the elements of a legal claim made under the Constitution. So although employees may be successful grieving their claim instead of going the MPSB route (and anecdotally, it appears more are going the arbitration route given the current state of affairs discussed in more detail below),[69] they are not receiving the First Amendment protection to which they are entitled and this may prove pivotal in some cases.[70]

A federal employee who chooses to forgo the negotiated grievance procedure route may instead proceed under the civil service laws. Whether an employee wishes to have his or her claims heard under a federal whistleblower statute like the Whistleblower Protection Act of 1989,[71] civil service regulations,[72] or the First Amendment of the Constitution, such claims must be brought under the CSRA. With regard to constitutional claims, this is because the Supreme Court held in *Bush*

---

68. Marvin F. Hill, Jr. & James A. Wright, *Employee Refusals to Cooperate in Internal Investigations: "Into The Woods" with Employers, Courts, and Labor Arbitrators*, 56 MO. L. REV. 869, 892 n.132 (1991) ("[T]he rule of law in the federal sector is clear: arbitrators must consider external law, and the U.S. Constitution is the supreme law.") (citing U.S. Dep't of the Treasury v. Nat'l Treasury Employees Union Local 183, 82 Lab. Arb. (BNA) 1209, 1214 (1984) (Kaplan, Arb.)).

69. *See* Don Cheney, *Postal Employees Should Think Twice Before Appealing Case to MSPB*, POSTALREPORTER.COM BLOG, http://www.postalreporter.com/news/2007/02/12/postal-employees-should-think-twice-before-appealing-case-to-mspb (Feb. 12, 2007) ("*Kenneth Jones vs. US Postal Service* [216 F. App'x 986 (Fed. Cir. 2007)], illustrates why postal employees should think twice before appealing their discipline to the Merit Systems Protection Board. They have a better chance of success in the grievance procedure." (citation added)).

70. *See* Joseph E. Slater, *The "American Rule" That Swallows The Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 103 (2007) ("Even with just cause protection, workers in the unionized or public sector can and routinely are fired.").

71. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. §§ 1211-1219, 1221, 1222, 3352 (2000)).

72. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). The CSRA of 1978 establishes specific "prohibited personnel practices," including unlawfully discriminatory actions, politically coercive actions, and retaliatory actions for whistleblowing. 5 U.S.C. §§ 2302(b)(1), (3), (8), (9) (2006). For an employee to be removed from their position, the burden is on the agency to show that such a removal would "promote the efficiency of the service." 5 U.S.C. § 7513(a) (2006); *id.* § 7701(c)(1) (2006) (placing the burden on the agency as far as the merits of the case); 5 C.F.R. § 1201.56(a)(1)(ii) (2008).

that the CSRA administrative scheme provides an adequate, alternative remedy for such claims.[73]

The civil service template means that after federal employees suffer a violation of their constitutional rights in the workplace through an adverse employment action, they must appeal the decision of their agency first to an administrative judge (AJ) designated by the Merit Systems Protection Board (MSPB) at one of five regional offices across the country.[74] Thereafter, if the employee loses at the AJ level, he or she may file a petition for review (PFR) with the MSPB itself.[75] The MSPB hears very few of these appeals (approximately 10 percent) because of a highly deferential standard of review.[76]

Regardless of whether the MSPB grants the PFR, the employee may appeal to the U.S. Court of Appeals for the Federal Circuit,[77] the court designated by Congress to hear such claims since 1982.[78] The appellate court's review is also severely circumscribed, and the AJ or MSPB's decision may be overturned only if deemed something akin to arbitrary and capricious.[79] Historically, the AJ and MSPB have been

---

73. Bush v. Lucas, 462 U.S. 367, 388 (1983).

74. 5 C.F.R. § 752.405(b) (2008); 5 U.S.C. § 1204(g) (2006) ("The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board."); *see also* West & Durant, *supra* note 2, at 120.

75. West & Durant, *supra* note 2, at 113.

76. In recent years, there have been between 1,000 and 2,000 PFRs, with the large majority (anywhere from 84% to 94%) resulting in the Board not changing the AJ decision. *Id.* at 115 (Table 2 statistics from 1988-1997). Petitions are granted "only when significant new evidence is presented to [the MSPB] that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation." Heaganns v. Dep't of Defense, 101 M.S.P.R. 159, 160 (2006), 2006 M.S.P.B. 28, 1 (citing 5 C.F.R. § 1201.115).

77. 5 U.S.C. § 7703(a)(1), (b)(1) (2006).

78. Federal Court Improvement Act of 1982, 28 U.S.C. § 1295 (a)(9) (2006).

79. "The decision of the MSPB must be affirmed unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence." Holland v. Dep't of Air Force, 31 F.3d 1118, 1120 (Fed. Cir. 1994) (citing 5 U.S.C. § 7703(c)). For a more complete summary of CSRA procedure, *see* Secunda, *supra* note 7.

affirmed 93 percent of the time.[80] Comparative judicial affirmance rates by similar federal agencies lie in the 75 percent to 83 percent range.[81]

As a result of this intricate framework and the substantial deference given to federal agency employers by the relevant adjudicators, perhaps it is not surprising that the CSRA administrative scheme is not vindicating the speech rights of federal employees. I recently laid out the extent of the problem in a comprehensive analysis of all MSPB and Federal Circuit cases involving the constitutional free speech claims of federal employees.[82] The study established that not a single one of these types of claims had ever been successful on the merits before the MSPB or Federal Circuit.[83] I therefore concluded that, "[t]he message that federal employees are apparently receiving is that their First Amendment claims will not be treated seriously."[84]

---

80. Merit Systems Protection Board, *FY 2006 Performance and Accountability Report (PAR)* 11 (Nov. 15, 2006), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=277562&version=277871&application=ACROBAT.

81. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law,* 1990 DUKE L.J. 984, 1022 (1990) (finding that in 1984-85, federal circuit courts affirmed in full 75% of NLRB orders, 83% of Immigration and Naturalization Service orders, and 81% of Patent and Trademark Office orders).

82. Secunda, *supra* note 7.

83. *Id.*

84. *See* Paul M. Secunda, *Sound Off: Federal Employees Face a Stunning Lack of Protection for Free Speech*, LEGAL TIMES, Oct. 22, 2007 at 60. I also pointed out that federal employees could not take solace in the existence of whistleblower statutes, such as the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 32 (1989) (codified at 5 U.S.C. §§ 1211-1219, 1221, 1222, 3352 (2000)), even though this was one of the arguments advanced for limiting First Amendment speech rights of public employees in *Garcetti*. *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) ("The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."). This "powerful network" of whistleblower laws on the federal level has led to largely ineffective relief. *See* Secunda, *supra*, note 7 ("[O]nly one of the 120 appeals brought by whistleblowers to the Federal Circuit since 1984 has succeeded."). Relying exclusively on whistleblower protections also impoverishes the value of constitutional rights and constitutional adjudication. *See* Davis v. Passman, 442 U.S. 228, 242 (1979) ("[U]nless [constitutional] rights are to become merely precatory . . . litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the

III. THE MAGNIFICATION OF GARCETTI'S IMPACT CAUSED BY THE MSPB AND FEDERAL CIRCUIT

The ultimate issue with the administrative scheme under the CSRA is that the MSPB and Federal Circuit have both misapplied the holdings of *Garcetti* and completely failed to apply it at all in appropriate cases. Whether this is because of unfamiliarity with applicable legal doctrine or a good faith belief in the rightness of their decisions is really beside the point. At the end of the day, these decisions have made it less likely for federal employees to succeed on their free speech claims than their comparatively-better-off state and local employee counterparts who can proceed under section 1983 directly to federal court.

A. Federal Employees Lacking First Amendment Rights: Case Studies

The following section highlights the treatment of *Garcetti* cases by the MSPB and Federal Circuit. It establishes how the lack of familiarity and casual attitude towards this area of the law by these two entities impacts federal employee free speech rights. The following cases represent the extent of such cases in the two years since *Garcetti*: one MSPB case where the Board applies *Garcetti* to the detriment of the federal employee, one MSPB case where the Board should have applied *Garcetti*, and one Federal Circuit case where the court also erred in failing to apply *Garcetti.*

1. Chambers v. Department of the Interior

---

judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection.").

In *Chambers v. Department of the Interior*,[85] the employee, the former chief of the U.S. Park Police, warned about insufficient staff and declining safety in the parks and parkways in the post-9/11 world.[86] Her supervisor fired her when he discovered that she had shared her concerns with *The Washington Post*.[87] The Merit Systems Protection Board found that her interview with *The Washington Post* was not protected First Amendment speech, based in part on the rationale in *Garcetti*.[88] She brought whistleblowing and First Amendment retaliation claims under the civil service regulations after her official termination.[89]

The administrative judge upheld her dismissal, holding on the First Amendment issue that she did not speak as a citizen and therefore, under *Garcetti*, had no First Amendment protection.[90] The Board affirmed the AJ decision, specifically agreeing that her speech to the reporter was pursuant to her official duties and thus not protected by the First Amendment.[91] In support of this conclusion, the Board noted that Chambers had contested a gag order that would not allow her to speak to the press under any circumstance because it was her job to speak to the press about agency issues.[92]

But the MSPB applied *Garcetti* in an incorrect manner. The Board seems to think that whenever a federal employee talks to a newspaper, the employee must be talking in an official capacity. Yet, the Board fails to do the functional analysis of job responsibilities that

---

85. 103 M.S.P.R. 375 (2006), *rev'd on other grounds*, 515 F.3d 1362 (Fed. Cir. 2008). The Federal Circuit reversed, 2-1, on Chamber's statutory whistleblowing claim under the WPA. Reliance on the whistleblower claim rather than on the First Amendment claim can be seen as diminishing the value of constitutional adjudication of these issues. *See* Merit Systems Protection Board, *supra* note 78. Nor do I believe that classifying the claim as a whistleblower one takes it outside the *Garcetti* framework. This is because Chamber's claim is simultaneously one between an employer and employee and one between the government and a citizen.

86. *Chambers*, 103 M.S.P.R. at 378.

87. *Id.* at 380-81.

88. *Id.* at 392.

89. *Id.* at 381.

90. *Id.* at 392.

91. *Id.*

92. *Chambers*, 103 M.S.P.R. at 392.

Garcetti requires.[93] Was Chambers fulfilling her role as the public spokesperson for the Park Police or was she reporting suspicions outside of her job description? The facts of the case suggest the latter.

Moreover, the Board came to this conclusion even though the Court in *Garcetti* specifically mentioned that public employees writing letters to a newspaper on their own time would likely not be speaking pursuant to official duties.[94] Is there really a constitutionally-cognizable difference between writing a letter to a newspaper on your own time, as in *Pickering*, and giving your opinion to the paper when asked it on your own time, as in *Chambers*? Regardless, it certainly was not Chambers' "official duty" to criticize her employer for its security and budgetary decisions. The Board majority's legal analysis is cursory on this point and suggests either unfamiliarity with this area of the law or a glaring indifference to the constitutional rights of federal employees.[95]

---

93. Garcetti v. Ceballos, 547 U.S. 410, 424-25 (2006).

94. *Id.* at 423 ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper. . . .").

95. For safe measure, and because the case was filed prior to *Garcetti*, the Board also concluded in the alternative that Chambers would have lost her case under pre-*Garcetti* law. *Chambers*, 103 M.S.P.R. at 392, 2006 M.S.P.B. at 19-20. Here, the Board found that although Chambers spoke out on a matter of public concern, she lost out in the *Pickering* balance because police officers, and especially chiefs of police, have less First Amendment protection than other public employees. *Id.* at 393 ("[C]onsistent with the decisions cited above, the agency had an overriding interest in not having the Chief of the Park Police publicly question decisions made by officials who outranked her concerning the functions and budget of the Park Police."). This categorical approach to *Pickering* balancing is at odds with the required individualized balancing of interests, *see* Brown v. Dep't of Transp., Fed. Aviation Auth., 735 F.2d 543, 548 (Fed. Cir. 1984), points to the fact that there are problems with the MSPB's approach even beyond *Garcetti*, and makes one wonder under what circumstance the Board would ever find in favor of First Amendment speech rights for federal employees.

2. *Smith v. Department of Transportation*

There is even less to commend in the Board's handling of *Smith v. Department of Transportation*.[96] Indeed, *Garcetti* is not even mentioned in this case even though it should have been considered as a threshold issue.[97]

Smith involved the thirty-day suspension of a Department of Transportation employee for allegedly misusing government documents to support his equal employment opportunity claim.[98] Smith claimed, among other things, that the thirty-day suspension violated his First Amendment rights to challenge the allegedly racially discriminatory promotion decision.[99]

Without considering whether Smith acted pursuant to his official duties, the Board relies on the "public concern" test of *Connick v. Myers*[100] and the balancing of interests test under *Pickering v. Board of Education*[101] to find no First Amendment free speech rights. This legal analysis is troubling for three distinct reasons. First, more than a year after the decision in *Garcetti*, the Board fails to recognize that a *Garcetti* issue even exists. This omission probably did not impact the outcome of the case because Smith's expression involved an external complaint, but it does indicate lack of familiarity with this area of the law.

Second, the Board misconstrued the *Pickering* balance by placing a heavy thumb on the scale in favor of the government's interests: "Employees' free speech rights must be balanced . . . against the need of government agencies to exercise 'wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'"[102] The "wide latitude" language relied upon by the Board

96. 106 M.S.P.R. 59 (2007).

97. *See Garcetti*, 547 U.S. at 421; Roosevelt, *supra* note 9.

98. *Smith*, 106 M.S.P.R. at 63-64.

99. *Id.* at 78. Because the administrative judge sustained Smith's initial appeal on other grounds, there was no need to discuss his First Amendment claims. However, the First Amendment claim became relevant again when the Board overturned some of the AJ's conclusions on the civil service provisions. *Id.*

100. 461 U.S. 138, 147 (1983).

101. 391 U.S. 563, 568 (1968).

102. *Smith*, 106 M.S.P.R. at 78 (quoting Mings v. Dep't of Justice, 813 F.2d 384, 387 (Fed. Cir. 1987) (quoting *Connick*, 461 U.S. at 146).

concerns a completely different issue dealing with public concern.[103] Third, and finally, the Board misunderstands the public concern speech inquiry, even though it eventually assumes that Smith's expression qualifies for the sake of argument.[104] It wrongly found that Smith's complaint has to be public to qualify as a matter of public concern,[105] and incorrectly maintained that the filing of a discrimination claim that is "personal in nature and limited to the complainant's own situation," involves a matter of purely private interest.[106]

Smith therefore suggests that the MSPB lacks the necessary tools to understand this complicated area of public employment law.[107] As a result, federal employees' First Amendment rights to free speech continue to be unnecessarily sacrificed.

---

103. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. So in reality, only when public employee speech is on language *not* a matter of public concern does the employer have wide latitude to manage its office, not when the expression is important to public debate.

104. *Smith*, 106 M.S.P.R. at 80.

105. *Id.* at 79. But the Supreme Court clearly held in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), that a racial discrimination complaint made in a private conversation could still be on a matter of public concern. *Id.* at 415-16. *See also* Rankin v. McPherson, 483 U.S. 378, 386 (1987) (holding that private, negative comments made about the assassination attempt on President Reagan were on a matter of public concern).

106. *Smith*, 106 M.S.P.R. at 79. The Board's cursory conclusion that an EEO complaint is merely personal in nature indicates a foundational misunderstanding of the dual purposes of Title VII. The purpose of employment discrimination laws is both to make the individual whole for unlawful discrimination *and* to vindicate the public interest in eradicating employment *discrimination* from society as a whole. EEOC v. Waffle House, Inc., 534 U.S. 279, 296 (2002); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). To say that an EEO complaint only serves one's own purposes is to totally ignore the public interests vindicated by such laws and the complaint filed by Smith. *See Albemarle*, 422 U.S. at 422 (establishing eradication of discrimination throughout the economy as one of the central statutory purposes of Title VII).

107. Alternatively, *Smith* may be about more than just a lack of competence, but also indicative of the politics of a Republican-dominated Board. *See* Secunda, *supra* note 7 (describing the membership of the M.S.P.B. during this period).

3. What to Expect from the Federal Circuit in the Future

This lack of competence at the MSPB would be less worrisome if there was meaningful judicial review by an Article III court. Yet, there is no reason to believe that the Federal Circuit Court of Appeals will fill that void if past history is any indication. Although the Federal Circuit has yet to issue a *Garcetti* opinion as of April 2008,[108] its record in dealing with First Amendment claims pre-*Garcetti* does not inspire confidence.

To review the recent attitude taken by the Federal Circuit towards federal employee free speech claims just consider the last two cases the Federal Circuit has ruled on in this context:

(1) King v. Depertmant of Veterans Affairs:[109]

> King also argues that her statements were protected by the First Amendment, but the government may restrict speech if it 'reasonably believe[ ] [sic] [it] would disrupt the office, undermine [a supervisor's] authority, and destroy close working relationships.' The record discloses substantial evidence to support a conclusion that this is such a situation.[110]

(2) Kohl v. U.S. Postal Service:[111]

> Kohl's First Amendment claim is without merit. Kohl claims that the USPS sent him to the fitness for duty examinations and removed him because he wrote letters.

---

108. It had the opportunity to apply *Garcetti* to a First Amendment issue in *King v. Dep't of Veteran Affairs*, discussed below, but found against the employee based on the disruption caused by the employee's speech. 248 F. App'x 192, 194 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (U.S. 2008).

109. 248 F. App'x 192 (Fed. Cir. 2007).

110. *Id.* at 194. (alterations in original) (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).

111. 115 F. App'x 49 (Fed. Cir. 2004).

> . . . The administrative judge found that Kohl's hostile letter-writing campaigns disrupted the workplace and caused fear in other employees . . . . The First Amendment does not require an agency to tolerate letters that disrupt a government workplace and intimidate other employees.[112]

This is the sum total of what the Federal Circuit had to say in the First Amendment free speech context in the last four years. Regardless of the nature of the underlying facts of these cases, the court's cursory analysis of First Amendment issues suggests strongly that it does not sufficiently understand all the considerations that go into this legal analysis.[113] It is also noteworthy that the circuit court has only heard two cases in the previous four years on this issue. I do not believe this is because federal employees do not desire to bring these claims. It is much more likely that, "federal employees are not bringing such claims because there is no reason to think that such claims have any chance."[114]

As for evidence of the Federal Circuit's lack of familiarity with the public employee free speech framework under the First Amendment, consider that the Federal Circuit has heard a total of seventy-nine First Amendment cases in its twenty-five year existence, while hearing some 5,741 patent cases during that same period.[115] Now, with time comes experience, but the affirmance rate suggests that the Federal Circuit is none too eager to disagree with the MSPB on federal personnel matters. Alternatively, and giving the court the benefit of the doubt, it might be attributable to the fact that, "[m]any of [the Federal Circuit's] non-precedential opinions are in *pro se* appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are

---

112. *Id.* at 52 (citing *Connick*, 461 U.S. at 154).

113. To be fair, the Federal Circuit did a much better job addressing the necessary analysis in *Haddon v. Executive Residence at White House*, 313 F.3d 1352 (Fed. Cir. 2002), by going through the necessary steps of the pre-*Garcetti* free speech framework. But that case seems to be the exception to how these cases are approached rather than the rule.

114. Secunda, *supra* note 7.

115. The queries run in the CTAF (Westlaw Federal Circuit database) were: "'first amendment' % patent! copyright! trademark!" and "patent! and da (after 1982)," respectively.

often poorly briefed, it is easy to miss potentially important legal issues . . . ."[116] Yet, federal employees are not prisoners, and enjoy more constitutional protections.

Either way, the Federal Circuit's track record of only finding for agencies on federal employees' First Amendment *Pickering* claims pre-*Garcetti*[117] is dismal and hardly leads to the conclusion that the court will apply *Garcetti* properly, let alone recognize its existence and the fact that it is binding precedent.[118] As a result, expect federal employee free speech claims to continue to suffer an unjust fate in this post-*Garcetti* world.

CONCLUSION

The combination of the peculiar scheme federal employees have to vindicate their First Amendment free speech rights and the *Garcetti* holding results in federal employees having less opportunity to speak freely and promote needed transparency and accountability in the federal government. This is a troubling state of affairs, as these employees are our eyes and ears. Without them, it is impossible to keep track of the multitude of programs that our federal government provides. Federal employees are not going to speak out about wrongdoing, inefficiency, or dangerous conditions if all that awaits them when all is said and done is an unemployment check.

What is needed at this point is a courageous Supreme Court decision that recognizes the error of its ways and the faulty incentive system its current bright-line rule establishes.[119] In any event, the time is

---

116. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 16 (2007) (citing ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS 75 app. (2005) (quoting Judge JF-2)).

117. *See supra* notes 76-78.

118. Smith v. Dep't of Transp., 106 M.S.P.R. 59, 80 (2007), 2007 M.S.P.B. 142, 24.

119. The overturning of *Garcetti* being unlikely in the short-term, Congress could amend the CSRA to exempt First Amendment claims from its framework. This line of attack, however, would also require an amendment to Section 1983 so that federal employees could bring First Amendment claims using that procedural vehicle. *See* Secunda, *supra* note 7. Finally, as a stop-gap measure, Congress should

well past nigh to overturn *Garcetti* and provide a balancing of interests that is particularly attuned to the issues federal employees face when informing the public about wrongful official conduct or safety and health issues in the workplace. Such a new precedent will substantially help to overcome the current state of affairs in which our three million federal employees have lost their ability to be the vanguard of the citizenry.[120]

---

at least consider whether nominees to the Federal Circuit or MSPB have the necessary competence in this area of public employment law.

120. The concept of public employees as the vanguard of the citizenry is discussed in more detail in Paul M. Secunda, *More Than Employees: Citizens working in government need better constitutional protection from retaliation*, LEGAL TIMES, May 21, 2007 ("The time has already come for the Supreme Court to overturn its erroneous [*Garcetti*] decision. It's time to call citizen-employees back to the vanguard.").